MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

HELENA BUILDING INDUSTRY ASSOCIATION OF HELENA, MONTANA; BEASON ENTERPRISES, INC.; JERRY CHRISTISON; CONNOR BUILDING AND DESIGN LLC; DEREK BROWN CONSTRUCTION, INC.; GOLDEN EAGLE CONSTRUCTION, INC.; HAMLIN CONSTRUCTION AND DEVELOPMENT CO., INC.; GARY HARTZE; JAY HESLEP; MIKE HUGHES; JACKSON CREEK JOINERY, LTD.; JERNKA CUSTOM HOMES, INC.; M & A CUSTOM HOMES, LLC; DENNIS MCCRANIE; MARK PARRIMAN CONSTRUCTION COMPANY, INC.; PIERCE & ASSOCIATES - BUILDINGS, LLC; MARK LINDSAY CONSTRUCTION CO., INC.; MITCHELL DELUDE CONSTRUCTION, INC.; MIKE MELVIN; PIONEER CONSTRUCTION; SUSSEX CONSTRUCTION, INC.; and SYSUM CONSTRUCTION, INC., Plaintiffs, v. LEWIS AND CLARK COUNTY, Defendant.	Cause No. BDV-2005-418 **ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs include the Helena Building Industry Association of Helena and local property owners and builders (hereafter collectively referred to as HBIA). HBIA seeks partial summary judgment on 4 of the 11 counts in their amended complaint. Oral argument was held on February 1, 2007, and the motion is ready for decision.

BACKGROUND

The Lewis and Clark County subdivision regulations became effective in February 2005. HBIA's complaint was filed in April 2006, and alleges that the fire protection standards and covenants in the 2005 regulations are invalid and unenforceable because: (1) the Lewis and Clark County Commissioners did not have either express or implied authority to enact the regulations; and (2) the County regulations violate HBIA's statutory and constitutional rights.

The County contends that Title 76, Chapter 3 of the Montana Code Annotated provides it with authority to adopt and enforce the new fire standards and covenants. The County argues that the new regulations are subdivision regulations, not building codes regulated by the Montana Department of Labor and Industry (hereafter MDLI). The County argues that Sections 76-3-501 and 504, MCA, authorize "approved construction techniques" designed to protect against natural hazards such as fire.

Among other things, the regulations require that fire sprinklers be installed in all one- and two-family dwellings located in Class I and II subdivisions,[1] or

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[1] The determination as to whether a subdivision is considered Class I or Class II is generally based on the placement of the development, its density, and the number of lots in the final plat. Class II subdivisions are generally smaller than Class I subdivisions. (Br. Supp. Mot. Partial Summ. J. (First, Second, Third and Eleventh Claims for Relief, Tab 1, Subdiv. Regs. App. L-5, L-6.)

a homeowner in a Class II subdivision can pay $1,000 per lot to the fire protection authority having jurisdiction (hereafter FPAHJ) in lieu of installing sprinklers. The fire regulations can also be met through acquisition of sufficient well-water flow or storage capacities. The fire standards, and separate fire covenants, were implemented to protect the public health, safety and welfare of residents by maintaining adequate water supplies for fighting fires. (Alles Aff., ¶¶ 12, 14, attached to Resp. Br. Opp'n Pls.' Mot. Partial Summ. J.)

HBIA claims that the MDLI is the only state agency with statutory authority to promulgate building regulations, except for the limited authority conferred on the fire prevention branch of the Department of Justice (hereafter DOJ). Section 50-60-202, MCA. The MDLI has adopted the International Residential Code (hereafter IRC) which sets forth the minimum standards for fire prevention. ARM 24.301.154. The IRC does not require fire sprinklers in family dwellings regardless of the size of the home or the density of homes located in a neighborhood.

To date, the County has not adopted a building code. HBIA argues that while the County could adopt a building code, it cannot adopt code requirements which are more stringent than those required by the MDLI/Department of Justice. Sections 50-60-301, -302, MCA; ARM 24.301.202. Further, the Building Code Division of the MDLI has previously concluded that Montana counties may not require installation of sprinkler systems in residential subdivisions. Finally, no statutory or administrative provision allows a county to promulgate or enforce building regulations, including fire sprinklers, through subdivision regulation instead of through adoption of building codes.

HBIA alleges that the County has unfairly selected a discrete group of individuals, including developers and purchasers of new homes within the County, to

pay a higher cost for housing to subsidize the cost of existing and new infrastructure needs. HBIA's amended complaint sets forth 11 claims for relief (the 4 counts upon which HBIA seeks partial summary judgment are in bold): **First Claim for Relief - Declaratory Judgment that the County Does Not Have Express or Implied Authority to Require, or Include as a Regulatory Alternative, Fire Sprinklers in Habitable Structures as a Condition to Approval of a Subdivision; Second Claim for Relief - Declaratory Judgment that the Per-Lot Fee is an Unlawful Tax; Third Claim for Relief - Declaratory Judgment that the County Does Not Have Express Authority to Enact Per-Lot Fees**; Fourth Claim for Relief - Declaratory Judgment that the Imposition of the Per-Lot Fee is an Unreasonable Exercise of the County's Government Powers; Fifth Claim for Relief - Declaratory Judgment that the County Does Not Have Legal Authority to Impose the Water Flow Requirements Contained in the 2005 Subdivision Regulations; Alternative Fifth Claim for Relief - Declaratory Judgment that the Water Flow Requirements Contained in the 2005 Subdivision Regulations Do Not Reasonably Reflect Expected Impacts Directly Attributable to the Subdivision; Sixth Claim for Relief - The Per-Lot Fee Violates the Plaintiff's Due Process Rights and Constitutes a Taking Without Just Compensation; Seventh Claim for Relief - The Water Flow Requirements Violate Plaintiff's Due Process Rights and Constitute a Taking Without Just Compensation; Eighth Claim for Relief - The Per-Lot Fee Denies Equal Protection of the Law; Ninth Claim for Relief - Declaratory Judgment Invalidating the 2005 Subdivision Regulations Because the Commission Failed to Adhere to Statutory Prerequisites in Enacting the 2005 Subdivision Regulations; Tenth Claim for Relief - The Limitation on Public Hearings and Ex Parte Policy Denies Subdivision Applicants Due Process and Rights of Participation; **Eleventh Claim for Relief - Declaratory Judgment that the County Does Not Have**

Authority to Impose Fire Protection Covenants.

HBIA seeks a declaratory ruling in their favor on the first, second, third and eleventh claims for relief.

STANDARD OF REVIEW

Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. Minnie v. City of Roundup, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine issues for trial. Sunset Point P'ship v. Stuc-O-Flex Int'l, 1998 MT 42, ¶ 12, 287 Mont. 388, ¶ 12, 954 P.2d 1156, ¶ 12. The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.

Summary judgment motions encourage judicial economy through the elimination of unnecessary trial, delay and expense. Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977). However, summary judgment is not to be utilized to deny the parties an opportunity to try their cases before a jury. Brohman v. State, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). "Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists." Clark v. Eagle Sys., Inc., 279 Mont. 279, 283, 927 P.2d 995, 997 (1996), *citations omitted*. If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. Rogers v. Swingley, 206 Mont. 306, 312, 670 P.2d 1386, 1389 (1983), *citing*

Cheyenne W. Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978), *other citations omitted.*

There are no disputed issues of material fact that would prevent the Court from deciding this motion.

DISCUSSION

It is undisputed that significant fire danger exists throughout most areas of Lewis and Clark County, and all reasonable and lawful means should be implemented to prevent fires as homes continue to be built in previously uninhabited areas. The present action was brought pursuant to the "Uniform Declaratory Judgment Act," Section 27-8-101, MCA, *et seq*, which allows any person or entity the right to petition the Court to determine the validity of any statute or municipal ordinance. The issue presented is whether the County may lawfully exercise the power to require sprinkler systems in residential dwellings and/or alternative fire protection measures when said measures are not required by the MDLI or the fire prevention branch of the DOJ.

It is undisputed that the County is a government unit with only general governing powers. A local government unit with general governing powers may only exercise those powers specifically granted by law, or any powers reasonably implied therefrom. Mont. Const., Art. XI, § 4. In contrast, local government units with self-governing powers may exercise any power not expressly prohibited by the Montana constitution or statutes. Mont. Const., Art. XI, § 5; Section 7-1-101, MCA.

The DOJ is tasked with rule-making authority and the effectuation of fire prevention laws in Montana. Section 50-3-102, MCA. However, rules relating to building code requirements which are "covered by the state building code or a county, city or town building code [are only] effective upon approval of the department of

labor and industry. . . ." Section 50-3-103(2), MCA. Pursuant to Section 76-3-511, MCA, local regulations may be more stringent than state regulations or guidelines only if the governing body makes written findings that "(a) the proposed local standard or requirement protects public health or the environment; and (b) the local standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology." Section 76-3-511(2)(a), -(b), MCA. In addition, the written findings required under that statute must "reference information and peer-reviewed scientific studies" and must contain specific information "regarding the costs to the regulated community that are directly attributable to the proposed local standard or requirement." Section 76-3-511(3), MCA. It is undisputed in this case that no such written findings were made when the 2005 standards and covenants were promulgated.

The County's 2005 regulations provide that for smaller subdivisions (identified as Class II under the regulations), the new subdivision applicant must provide either: (1) fire sprinklers; (2) specific well-water flow or storage requirements; or (3) a per-lot fee of $1,000 payable at the time of final plat approval directly to the fire authority. (Subdiv. Regs. App. L6, L7.) As a condition for subdivision application and approval, all one- and two-family dwellings more than two stories in height must contain fire sprinklers. (Subdiv. Regs. App. L7, L11.) The regulations further require that all other buildings in all subdivisions, other than commercial storage units, contain sprinklers. (Subdiv. Regs., L-11, L-12.) For larger subdivisions (identified as Class I under the regulations), payment of a per-lot fee is not an alternative. The fire protection covenants appear to simply implement the fire protection standards. (Subdiv. Regs.., L-16, L-17.)

Title 7, Chapter 33 of the Montana Code Annotated sets forth several

options by which a local government can meet its fire prevention and protection needs, none of which authorize the use of sprinkler systems or alternatives to sprinkler systems. Fire sprinklers are clearly a building regulation, not a subdivision regulation. *See e.g.*, Bldg. Indus. Assoc. of N. Cal. v. City of Livermore, 52 Cal. Rptr. 2d 902, 907 (Cal. 1996); City of Minnetonka v. Mark Z. Jones Assocs., Inc., 236 N.W.2d 163, 167 (Minn. 1975); Greene v. Winston-Salem, 213 S.E.2d 231 (N.C. 1975). Montana law defines a building regulation as "any law, rule, resolution, regulation, ordinance or code . . . enacted or adopted by the state or any municipality . . . relating to the design, construction, reconstruction, alteration, conversion, repair, inspection or use of buildings and installation of equipment in buildings." Section 50-6-101(3)(a), MCA. The MDLI is the state entity responsible for promulgation and enforcement of building codes. The purpose of Montana's building codes is to "provide reasonably uniform standards and requirements for construction and construction materials consistent with accepted standards of engineering, and fire prevention practices." Section 50-60-201(1), MCA, *emphasis added.* MDLI is the only state agency with authority to promulgate building regulations, other than the fire prevention branch of the DOJ. Section 50-60-202, MCA. As above-referenced, the MDLI has adopted the International Residential Code (IRC), which sets forth the minimum standards for fire prevention - which do not include fire sprinklers. ARM 24.301.154.

While a county may adopt its own building code, it may include only those provisions adopted by MDLI. Section 50-60-301(2), MCA; ARM 24.301.202. In addition, a county may not enforce a building code which has not been certified by MDLI. Section 50-60-302(1)(a), (b), MCA. Here, it is undisputed that the County has not obtained certification from MDLI to enforce its 2005 fire sprinkler requirements. In addition, while Section 76-3-511, MCA, allows a local governing body to

promulgate more stringent requirements than those set forth in state regulations or guidelines, the County did not comply with the requirements of the statute by providing written findings including "peer-reviewed scientific studies" and a cost calculation as to the effect of the stricter fire regulations upon the "regulated community." Section 76-3-511(3), MCA.

Subdivision regulation includes the "division of land [to] . . . create one or more parcels . . . in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed." Section 76-3-103(15), MCA. While it is clear that the County's fire protection regulations are designed to protect the public health, safety and welfare by providing adequate water to fight fires and to protect against natural disasters, and while the County has broad powers as to subdivision review and the requirements for the division and development of real property, the County cites no authority which would grant it the right to regulate private property rights by the implementation of building codes relating to home sprinkler systems. *Compare*, State *ex rel* Dreher v. Fuller, 257 Mont. 445, 452, 849 P.2d 1045, 1048 (1993) (The Legislature granted counties broad powers as to the division of land.), *and* Bldg. Indus. Assoc. of N. Cal. v. City of Livermore, 52 Cal. Rptr. 2d 902, 907 (Cal. 1996) (City must be granted specific "statutory authority to impose more stringent residential fire sprinkler standards than those found in Uniform Building Code."); City of Minnetonka v. Mark Z. Jones Associates, Inc., 236 N.W.2d 163, 167 (Minn. 1975) ("[T]o allow individual municipalities to impose additional burdens on builders in the name of fire prevention, sanitation, or security would totally emasculate the explicitly stated purpose of the statute authorizing the State Building Code."); Greene v. Winston-Salem, 213 S.E.2d 231, 237 (N.C. 1975) (Ordinances requiring sprinkler systems are building regulations subject to the state building code enforcement entity.)

The County claims that its fire sprinkler requirements are not building codes but are instead "approved construction technique[s]" authorized by Section 76-3-504, MCA. The County's suggestion that it can thusly impose restrictions more stringent than required under state law would violate Montana law and blur the distinction between local governments with general powers and those with self-governing powers. In addition, to impose more stringent sprinkler system requirements, the County would, at a minimum, be required to follow the requirements set forth in Section 76-3-511, MCA.

Because the Court cannot determine whether the remaining portion of the sprinkler system standards and covenants are valid, it must invalidate the regulations in their entirety. For the foregoing reasons, the Court believes that the County did not have authority to require fire sprinklers or per-lot fees or to impose fire protection covenants more strict than those imposed by MDLI and the DOJ, without, at a minimum, following the statutory requirements of Section 76-3-511, MCA. While the County may have authority to implement per-lot fees or water storage or capacity requirements, it cannot do so under the present package with sprinkler systems as an option, as presently drafted under the 2005 subdivision regulations.

CONCLUSION

For the above reasons, it is hereby ORDERED, ADJUDGED and DECREED that HBIA's motion for partial summary judgment as to their First Claim for Relief is GRANTED, partial summary judgment as to their Second Claim for Relief is *indirectly* GRANTED, partial summary judgment as to their Third Claim for

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Relief is *indirectly* GRANTED, and partial summary judgment as to their Eleventh Claim for Relief is GRANTED.

DATED this 19 day of March, 2007.

JEFFREY M. SHERLOCK
District Court Judge

pcs: Stephen C. Bullock
K. Paul Stahl/Tara A. Harris

T/JMS/hbis v l&c co ord mot partial summ j.wpd